

WARY HOLDINGS SDN BHD*a***v.****IMATEX BHD**

HIGH COURT SABAH AND SARAWAK, SIBU

b

TEE AH SING J

[SUIT NO: 22-93 OF 1998]

26 JANUARY 2000

CIVIL PROCEDURE: *Summons-in-chambers - Amendment and service - Time frame - Whether 14-day period under O. 20 r. 9 Rules of High Court 1980 applicable - Whether summons-in-chambers governed by O. 32 - Whether there is a time frame under O. 32*

c

The defendant applied under O. 20 r. 9 of the Rules of the High Court 1980 ('RHC') for an order that the plaintiff's amended summons in chambers be struck out with costs. The court order for amending the said summons in chambers was made on 11 May 1999. It was submitted that the plaintiff failed to comply with the 14-day requirement pursuant to O. 20 r. 9 RHC as the amended summons in chambers was served on the defendant on 21 June 1999 when it should have been served by 26 May 1999.

*d**e***Held:**

[1] Order 20 r. 9 RHC is a general provision concerning leave given to a party to amend a writ, pleading or other document. However, summons-in-chambers are specifically dealt with under O. 32 RHC. Thus, O. 20 r. 9 has no application in respect of the amendment of summons in chambers which is governed specifically by O. 32 RHC.

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[2] There is no provision in O. 32 RHC to state that if a party fails to amend the summons in chambers after a period of 14 days after the order was made, the order shall cease to have effect. Further, there is no court order specifying that the amended summons in chambers should be filed and served within 14 days after the order was made. Thus, the amended summons in chambers served on the defendant on 21 June 1999 was valid in law.

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[Application dismissed with costs.]

*h**i*

- a Case(s) referred to:**
Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 (refd)
- Legislation referred to:**
Rules of the High Court 1980, O. 20 r. 9, O. 32 r. 2(2)
- b** *For the plaintiff - Richard Poh; M/s Kho & Poh*
For the defendant - Polycarp Teo Sebom; M/s Teo Sebom, Tan & Madhi
Reported by Usha Thiagarajah

JUDGMENT

- c Tee Ah Sing J:**
- This is an application by summons in chambers by the defendant under O. 20 r. 9 of the Rules of the High Court 1980 (“the RHC”) for an order that the amended summons in chambers dated 9 October 1998 filed by the
- d** plaintiff be struck out with costs to the defendant to be taxed unless agreed.
- The application is supported by the affidavit of Polycarp Teo Sebom affirmed on 19 July 1999. The pertinent parts of the affidavit reads as follows:
- e** 3. On 9.10.1998, Messrs. Chan, Kho & Co. Advocates, Kuching, Sarawak, acting on behalf of the Plaintiff herein took out a Summons In Chambers (Order 32 rule 1 of the Rules of High Court 1980, section 6, Arbitration Act, 1952) against the Defendant herein.
- f** 4. On 8.2.1999, the defendant raised a preliminary objection to the said Plaintiff’s Summons In Chambers, on ground that the said Summons In Chambers has failed to comply with Order 32 rule 2(2) of the Rules of High Court, 1980. The court on 24.3.1999 ruled that the Plaintiff should have filed an application for leave to amend the said Summons In Chambers.
- g** 5. on 19.4.1999, the Plaintiff took out Summons In Chambers (Order 32 rule 2 of the Rules of High Court, 1980) to amend the said Summons In Chambers. A court order for amending the said Summons In Chambers was made on 11. 5. 1999.
- h** 6. Under Order 20 rule 9 of the Rules of High Court, 1980, the Plaintiff must amend and serve the Amended Summons In Chambers on the Defendant on 26.5.1999.
- i** 7. No such Amended Summons In Chambers was served by the Plaintiff until 21.6.1999.

8. There was no court order from this honourable court for the Amended Summons In Chambers to be filed or served by the Plaintiff after the said 14 days requirement specified under Order 20 rule 9 of the Rules of High Court, 1980. **a**
9. The Plaintiff served on the Defendant the said Amended Summons In Chambers dated 9.10.1999, which is bad in law and is of no basis. **b**

The learned counsel for the defendant in his written submission contended, *inter alia*, as follows:

1. Since the plaintiff failed to reply or answer to the affidavit in support of the defendant, the averment contained in the said application in support is deemed to have been admitted. In support the case of *Sunrise Sdn. Bhd. v. First Profile (M) Sdn. Bhd. & Anor.* [1997] 1 AMR 1 was cited. **c**
2. On 19 April 1999 the plaintiff took out summons in chambers under O. 32 rule 2 of the RHC to amend the said summons in chambers. A court order for amending the said summons in chambers was made on 11 May 1999. According to O. 20 r. 9 of the RHC where it states that “where the court makes an order under this order giving any party leave to amend a writ ... then, if that party does not amend the document ... if no period is so specified, of a period of 14 days after the order was made, the order shall cease to have effect ... **d**
- e**

In this case, the plaintiff according to O. 20 r. 9 of the RHC after the court giving order for amending the said summons in chambers was made on 11 May 1999 the plaintiff should amend and serve the amended summons in chambers on the defendant by 26 May 1999. The 14-day period should end on 26 May 1999 and not on 21 June 1999 the date the plaintiff served the amended said summons in chambers. **f**

It is submitted that the plaintiff failed to comply with the requirement specified under O. 20 r. 9 of the RHC that the plaintiff failed to amend and serve the amended summons in chambers within the 14 days requirement period. **g**

3. There was no court order for the amended summons in chambers to be filed and served by the plaintiff after the said 14-day requirement specified under O. 20 r. 9 of RHC.

The learned counsel for the plaintiff submitted that the failure to file an affidavit in opposition only means that the admission is restricted to the facts stated in the affidavit in support and would not include proposition of law. **h**

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- a* The amendment sought by the plaintiff and granted by the court was under O. 32 of the RHC and he submitted that O. 20 which governs amendment of writs, pleading and other documents has no relevance. Even if O. 20 r. 9 of the RHC has relevance, O. 20 r. 9 does not specifically say that the amended document has to be served within 14 days. Even if O. 20 r. 9 of the RHC
- b* can be read to mean that amendments should be served, this court nevertheless retain power to extend the period. It is necessary to bear in mind that the amendment sought by the plaintiff arose due to a typographical error in the original summons in chambers. It is a simple error of describing the counterclaim as being that of the plaintiff.
- c* He also submitted that even if the plaintiff did not make an application to amend, this court can of its own motion amend the summons in chambers by striking out that meaningless phrase and superfluous “of the plaintiff” which come after the word “counterclaim”.
- d* The learned counsel in reply submitted that there is no formal application made to this court to extend time and the plaintiff cannot make an oral application at this hearing without stating reasons.
- I shall now deal with the matter before me.
- e* In this case the plaintiff did not file in any affidavit in opposition. As such, this amounts to an admission by the plaintiff of the facts so asserted. (See *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529; [1997] 1 AMR 1). However, in this case the issue to be decided is one on a point of law and therefore no affidavit evidence is necessary.
- f* Order 20 r. 9 of the RHC reads as follows:
- Where the Court makes an order under this Order giving any party leave to amend a writ, pleading or other document, then, if that party does not amend the document in according with the order before the expiration of the period specified for that purpose in the order or, if no period is so specified, of a period of 14 days after the order was made, the order shall cease to have effect, without prejudice, however, to the power of the court to extend the period.
- g*
- h* Order 20 r. 9 of the RHC is a general provision concerning leave given to a party to amend a writ, pleading or other document. However, summons in chambers are specifically dealt with under O. 32 of the RHC. And O. 32 r. 2(2) of the RHC provides that “A summons may not be amended after issue without the leave of the court.” As such I am of the view that O. 20 r. 9 of the RHC has no application in respect of the amendment of summons in chambers which is governed specifically by O. 32 of the RHC.
- i*

On 11 May 1999 this court granted leave to the plaintiff to amend the summons in chambers under O. 32 r. 2(2) of the RHC. The amended summons in chambers was served on the defendant on 21 June 1999. It is to be noted that there is no provision in O. 32 of the RHC to state that if a party fails to amend the summons in chambers after a period of 14 days after the order was made, the order shall cease to have effect. Further, there is no court order specifying that the amended summons in chambers should be filed and served within 14 days after the order was made. As such, I am of the view that the amended summons in chambers served on the defendant on 21 June 1999 is valid in law.

In view of the foregoing, I dismiss the defendant's application with costs to be taxed unless agreed to the plaintiff.

*a**b**c**d**e**f**g**h**i*